Supreme Court, U.S.
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No. 95-1308

In the Supreme Court of the United States

OCTOBER TERM, 1995

V-1 OIL COMPANY, INC., D/B/A V-1 PROPANE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the system of warrantless regulatory inspections of property and records provided by the Hazardous Materials Transportation Act, 49 U.S.C. 1801 *et seq.* (HMTA), comports with the Fourth Amendment.

2. Whether the district court properly enjoined petitioner to comply with searches under the HMTA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 63 F.3d 909. The order and judgment of the district court (Pet. App. 16a-32a, 33a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on August 24, 1995. A petition for rehearing was denied on November 1, 1995. Pet. App. 1a. The petition for a writ of certiorari was filed on January 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, Congress enacted the Hazardous Materials Transportation Act, 49 U.S.C. 1801 *et seq.* (HMTA or Act), in order "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. App. 1801 (1988); see Pub. L. No. 93-633, 88 Stat. 2156.[1] Although congressional efforts to control the transportation of dangerous materials, especially by rail, date back to the early part of this century,[2] the HMTA provides a comprehensive regulatory scheme affecting the transportation of such materials in commerce, by all modes of transportation. It empowers the Secretary of Transportation to designate various dangerous substances as "hazardous materials," and to promulgate regulations regarding their transportation and handling. 49 U.S.C. App. 1803-1805 (1988 & Supp. V 1993). The Secretary is also specifically authorized to conduct investigations, require the maintenance and submission of reports and records, and conduct

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[1] During the pendency of this action, Congress recodified a number of federal transportation laws, including the HMTA, which now appears at 49 U.S.C. 5101-5127. See Pub. L. No. 103-272, 108 Stat. 745 (1994). As the court of appeals noted, however, that recodification does not make substantive changes in the affected laws, and is in any event not applicable to actions commenced prior to its enactment. Pet. App. 8a n.1; Pub. L. No. 103-272, §§ 6(a), 7(b), 108 Stat. 1378-1379. Like the court of appeals and petitioner, we cite herein to the pre-1994 codification.

[2] See Transportation of Explosives Act, ch. 234, 35 Stat. 554 (1908); 18 U.S.C. 831-835 (1976) (repealed by Pub. L. No. 96-129, § 216(b), 93 Stat. 1015 (1979)).

inspections. 49 U.S.C. App. 1808 (1988 & Supp. V 1993).

Of particular significance to this case, the Act provides:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> * * * * *
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.
>
> Any such officer, employee, or agent shall, upon request, display proper credentials.

49 U.S.C. App. 1808(c) (1988). Section 1808(c) thus authorizes inspections, without notice or warrant, "to the extent" that the property or records at issue relate to the particular activities to which the Act is addressed—*e.g.*, the transportation of hazardous materials in commerce.[3] The statute defines "transportation" to include any movement of hazardous materials, including loading, unloading, and incidental storage. 49 U.S.C. App. 1802(15) (1988 & Supp. V 1993).

The Secretary has promulgated extensive regulations to implement the HMTA, see 49 C.F.R. Pts.

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[3] The other clause of Section 1808(c), not pertinent here, authorizes similar inspections with respect to the manufacture or maintenance of containers for use in the transportation of hazardous materials in commerce. 49 U.S.C. App. 1808(c)(1) (1988).

107, 171-180, including regulations specific to carriage by rail. 49 C.F.R. Pt. 174. The Secretary has delegated to the Federal Railroad Administration (FRA) responsibility for administering the HMTA and all regulations issued under it insofar as they apply to transportation by rail, including carrying out inspections of records or property relating to the transportation of hazardous materials by rail. 49 C.F.R. 1.49(s)(1). Several of the Secretary's regulations are pertinent to this case. First, in accordance with the statutory definition of "transportation," the regulations make clear that the process of unloading a railroad tank car filled with hazardous materials is subject to the Act's requirements. See, *e.g.*, 49 C.F.R. 174.67. The regulations also address the situation of containers (including railroad tank cars) that may contain residual amounts of hazardous materials. 49 C.F.R. 173.29. Although some special provisions are made for such containers, they generally remain subject to the Act and regulations. *Ibid.* Insofar as property or records relate to rail transportation of hazardous materials, FRA inspectors are responsible for inspecting for compliance with all aspects of the requirements of the Act and regulations, including the adequacy of packaging, marking, and labeling, the procedures used in loading and unloading, the securing of container closures, and the documentation of hazardous materials shipments. See, *e.g.*, 49 C.F.R. 172.200-172.204, 172.330(a)(1)(i), 173.31, 174.59, 174.67.

2. Petitioner is a dealer in liquefied petroleum gas (propane) and is active in several western States. Pet. 3-4. Propane is a highly hazardous material, classified as a flammable gas under the HMTA. 49 C.F.R. 173.2, 173.2a, 172.101. Petitioner receives rail

tank cars of propane from suppliers, which it unloads into its own storage facilities. CA ER 195-196.[4] It then sends the unloaded cars—which contain residual amounts of propane—back to the original shipper. Both of those activities are subject to the HMTA and the regulations promulgated thereunder: the receipt and unloading of the rail tank cars constitutes "transportation," and the return of the unloaded cars is subject to regulatory requirements, such as that the cars be properly sealed and marked and that the shipments be properly documented. See 49 C.F.R. 173.29.

On one occasion in 1990, and three occasions from 1992 and 1993, FRA inspectors attempted to conduct unannounced inspections of petitioner's facilities. Pet. App. 5a-6a. Each time, petitioner refused permission to conduct an immediate inspection, indicating that it would permit inspection only after FRA officials completed a form developed by petitioner,[5] after which petitioner would, if it "approved" the request, schedule an inspection. *Ibid.*

3. In August 1993, the United States brought suit against petitioner pursuant to 49 U.S.C. App. 1810(a) (1988), which authorizes district courts to enter injunctive or other relief to remedy violations of the Act. The district court first entered a preliminary injunction, requiring petitioner to submit to war-

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[4] "CA ER" refers to the Excerpts of Record filed by petitioner in the court of appeals.

[5] Petitioner's form, which the district court described as being "couched in noticeably combative terms," required FRA inspectors to identify the purpose of the inspection, to describe their qualifications for performing the inspection, and to "read aloud" the provision of law authorizing the inspection. See Pet. App. 19a & n.2; *id.* at 5a-6a; CA ER 202.

rantless, unannounced inspections. Pet. App. 35a-47a. Pursuant to that injunction, FRA personnel conducted inspections of petitioner's facilities, which revealed a number of deficiencies in its operations. CA ER 225-228, 266-269.[6] The district court later granted the United States' motion for summary judgment, holding that the HMTA provides authority for warrantless inspections, Pet. App. 19a n.1,[7] that such inspections comport with the Fourth Amendment, Pet. App. 22a-28a, and that petitioner's continued refusal to comply with the HMTA, along with the interest in public safety, justified permanent injunctive relief. *Id.* at 28a-30a.

The court of appeals affirmed, holding, based on *New York* v. *Burger*, 482 U.S. 691 (1987), that warrantless inspections by the FRA pursuant to the HMTA comport with the Fourth Amendment. Pet. App. 2a-14a. The court first rejected petitioner's claim that it is not part of the "railroad industry," holding that petitioner's involvement in the rail transportation of propane places it within a pervasively regulated industry. *Id.* at 7a. The court next applied *Burger*'s three-part test for evaluating the validity of warrantless regulatory searches. It held that the first two prongs of the test are "easily satisfied," because the underlying regulatory scheme advances the "substantial governmental interest" in protecting life and property from dangers associated

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[6] Certain of the cited pages (CA ER 225-227) are also reproduced as Pet. App. I, in the "Lodging Appendix" submitted by petitioner.

[7] Petitioner has not challenged that statutory interpretation, either before the court of appeals or in its petition for review by this Court.

with the transportation of hazardous materials, and because unannounced inspections are necessary to "reasonably ensure that the statute is satisfactorily enforced." *Ibid.* (citing *United States* v. *Biswell*, 406 U.S. 311 (1972)). The court also held that the HMTA's inspection program satisfies the final prong of the *Burger* test, because it provides notice to entities such as petitioner that they are subject to periodic inspections, and because it reasonably limits the time, place, and scope of inspections. Pet. App. 7a-9a. Finally, the court held that the district court had not abused its discretion in entering permanent injunctive relief. *Id.* at 9a-10a.[8]

ARGUMENT

The court of appeals correctly applied the Fourth Amendment standards governing inspections of businesses in a closely regulated industry that this Court set out in *New York* v. *Burger*, 482 U.S. 691 (1987). Its decision does not conflict with any other reported decision; rather, as petitioner concedes (Pet. 3, 6), the application of *Burger* to inspections under the HMTA presents a question of "first impression." Nor does petitioner offer any other reason why this Court's review is warranted.

1. The Fourth Amendment's prohibition against unreasonable searches and seizures applies not only to individuals and private residences, but also to corporations and places of business. See *See* v. *City of Seattle*, 387 U.S. 541 (1967). As this Court has re-

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[8] Judge Noonan dissented. Judge Noonan was of the view that the HMTA scheme does not afford sufficient "certainty and regularity" in light of the large number of potentially hazardous materials and in light of what he believed to be the infrequency of FRA inspections. Pet. App. 10a-14a.

cognized, however, although searches of residences ordinarily must proceed pursuant to a search warrant, the Fourth Amendment does not necessarily require a duly-authorized governmental agency to obtain a warrant to inspect a regulated business. See *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76 (1970). That is because, "[w]hen a [person] chooses to engage in [a] pervasively regulated business * * * , he does so with the knowledge that his business records [and facilities] will be subject to effective inspection." *Biswell*, 406 U.S. at 316.

In *Burger*, this Court synthesized its earlier decisions involving regulatory searches and held that such a search comports with the Fourth Amendment where the business in question is part of a "closely regulated" industry, 482 U.S. at 702, and where three criteria are met:

> First, there must be a 'substantial' government interest that informs the regulatory scheme, pursuant to which the inspection is made.
>
> * * * * *
>
> 'Second, the warrantless inspections must be necessary to further [the] regulatory scheme.'
>
> * * * * *
>
> Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant.' In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of

> the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

482 U.S. at 702-703 (quotations and citations omitted); see *Donovan* v. *Dewey*, 452 U.S. 594, 600 (1981) (regulatory inspection programs are reasonable where "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes").

As the court of appeals held, those standards were met in this case. Petitioner was plainly involved in a pervasively regulated industry—the transportation of liquid propane—and thus, as the court of appeals observed (Pet. App. 7a), "has a reduced expectation of privacy because it transports, stores, and sells propane gas." Moreover, there is no serious question that ensuring the safe transportation of explosive or otherwise hazardous materials represents a "substantial government interest," *Burger*, 482 U.S. at 702. Congress enacted the HMTA in response to a series of catastrophic hazardous materials accidents, including accidents involving rail transportation. See H.R. Rep. No. 1083, 93d Cong., 2d Sess. 15-16 (1974).

Also unavailing is petitioner's claim (Pet. 15-16) that unannounced inspections are "not necessary to the regulatory scheme," the second criterion under *Burger*. As this Court has explained, that criterion does not require that warrantless searches be ab-

solutely essential in order for the regulatory scheme to have any efficacy, but instead is satisfied where the regulatory program could be "'frustrate[d]'" and be undermined as an "'effective and * * * credible deterrent'" absent unannounced warrantless inspections. *Burger*, 482 U.S. at 710 (quoting *Donovan* v. *Dewey*, 452 U.S. at 600); *Biswell*, 406 U.S. at 316. As the court of appeals recognized (Pet. App. 7a), in the context of the HMTA, "[a]dvanced notice of inspections could permit [petitioner] to temporarily correct violations and frustrate enforcement efforts."

Petitioner's assertion (Pet. 15) that "there is no illegal behavior to deter" on its part is incorrect and, in any event, irrelevant to the Fourth Amendment inquiry. It is undisputed that the FRA's inspections of petitioner's business premises following entry of the preliminary injunction in this case revealed violations of the HMTA. CA ER 225-228, 266-269; Pet. App. I. Moreover, because many of the practices against which the HMTA guards may either be rectified quickly or concealed, advance notice of official inspections would undermine enforcement of the Act. Those practices include the improper securement of rail cars carrying hazardous materials, the use of improper procedures during unloading operations, and the failure to retain proper records that may be urgently needed in the event of a derailment or other release of hazardous materials. Finally, petitioner is wrong to suggest that a dearth of demonstrated violations would indicate a lack of need for unannounced inspections. On the contrary, the goal of having unannounced inspections under the HMTA is to induce a high level of voluntary compliance with HMTA regulations on the part of businesses that cannot be assured that an inspection will

not be forthcoming. As the Tenth Circuit has put the point, an argument like petitioner's that a low incidence of regulatory violations indicates minimal need for an inspection program essentially asks the court to "discount the government interest in any regulatory scheme that has successfully furthered its purpose." *S & S Pawn Shop, Inc.* v. *Del City*, 947 F.2d 432, 437 (10th Cir. 1991).

The third and final criterion of the *Burger* test is whether the statutory scheme serves the basic functions of a warrant, by putting the subject on notice of the prospect of inspection and by limiting the discretion of the inspecting officers. See 482 U.S. at 703. As the court of appeals held, the inspection scheme under the HMTA satisfies that standard, by putting entities such as petitioner on notice that they are subject to periodic inspections, by reasonably limiting the time, place, and scope of inspections and by limiting the discretion of the inspecting officers. Pet. App. 8a-9a.

Petitioner argues (Pet. 11-13) that, given the large number of substances identified as hazardous, "anyone" could be subject to the Act, and thus petitioner was not put on notice of the likelihood of inspection. Under the HMTA, however, the only entities subject to inspection are those that "offer[] hazardous materials for transportation in commerce or transport[] hazardous materials in furtherance of a commercial enterprise." 49 U.S.C. App. 1802(11) (1988 & Supp. V 1993). Moreover, such entities are subject to inspection only "to the extent" that the properties or records in question relate to either the transportation or the shipment of hazardous materials in commerce (or to the manufacture or maintenance of containers for such transportation). 49 U.S.C. App.

1808(c) (1988). As the court of appeals recognized (Pet. App. 8a-9a), those provisions make clear that a business, such as petitioner's, that routinely unloads rail cars containing propane and dispatches cars containing propane residues for return shipment, is subject to inspection.

Petitioner also faults (Pet. 10-11) the court of appeals for referring to the nature of petitioner's business activities in concluding that petitioner was on notice of the possibility of an inspection. See Pet. App. 9a. The court of appeals, however, did no more than explain why the Act itself puts that type of business on notice of the likelihood of inspection. *Ibid.*[9] Petitioner also contends (Pet. 13-14) that the FRA's inspection program under the HMTA lacks "certainty and regularity" because of the purported infrequency with which inspections are conducted. Pet. 13-14. Petitioner's factual assertions about the frequency of inspection are incorrect.[10] In any event, as this Court has noted, the frequency of inspection,

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[9] Nor may petitioner establish a Fourth Amendment violation by speculating that warrantless inspections of other types of businesses under the HMTA would be invalid. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

[10] Petitioner asserts (Pet. 14) that the FRA attempted no inspections before 1990. In the district court, however, the United States presented evidence documenting inspections in 1985, 1986, 1988, and 1989. CA ER 229, 256-259, 270-271, 287-288. While petitioner now asserts that it was "not aware" of those inspections (Pet. 4 n.2), it did not offer any evidence refuting the government's proof.

although a factor to be considered, is "not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of inspecting officers." *Burger*, 482 U.S. at 711 n.21. As the court of appeals held (Pet. App. 9a), the HMTA properly cabins such discretion. *Ibid.* With regard to timing, the Act provides that inspections may be conducted only "at reasonable times and in a reasonable manner." 49 U.S.C. App. 1808(c) (1988). The FRA's Enforcement Manual further provides that inspections are ordinarily to be conducted during normal business hours. CA ER 232. Compare *Burger*, 482 U.S. at 711; *S & S Pawn Shop, Inc.* v. *Del City*, 947 F.2d at 438-439; *Lesser* v. *Espy*, 34 F.3d 1301, 1308-1309 (7th Cir. 1994).

Furthermore, as the court of appeals noted (Pet. App. 9a), "[t]he permissible scope of these searches [under the HMTA] is narrowly defined." The HMTA authorizes inspections only "to the extent that such records or properties relate to" the transportation of hazardous materials in commerce. 49 U.S.C. App. 1808(c) (1988). Thus, while the FRA inspects to determine compliance with regulatory requirements —*e.g.*, whether hazardous materials are marked for shipment, whether tank cars and other packages used for rail transportation are properly secured, whether loading and unloading procedures used for such materials are followed, and whether required documentation of hazardous materials shipments is maintained—it does not inspect the business entity's tax returns or other records unrelated to those regulations. Nor does the FRA conduct inspections of retail stores or other areas unrelated to rail transportation.

2. Petitioner also argues (Pet. 18-19) that the court of appeals erred in upholding the district court's injunction requiring petitioner to submit to inspections pursuant to the HMTA. That argument is derivative of petitioner's claim that the HMTA's provision for warrantless inspections of transporters of hazardous material is unreasonable under the Fourth Amendment. And, as the courts below held, given petitioner's repeated refusals to permit inspections in the past, an injunction was appropriate to permit the FRA to carry out its regulatory responsibilities under the HMTA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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